

In the Matter of:

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CASE NO. 89-278
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On October 2, 1989, Owen Electric Cooperative ("Owen") filed a complaint against The Union Light, Heat and Power Company ("ULH&P") alleging that ULH&P intends to provide retail electric service to a part of Saddlebrook Farms Subdivision ("Subdivision") which lies within the certified territory of Owen. The Subdivision is within the city limits of Florence, Kentucky, which has given a franchise to ULH&P for electric service. Owen alleged that such service by ULH&P would violate KRS 278.018 and asked the Commission to enter an Order directing ULH&P not to furnish, make available, render, or extend retail electric service within the Subdivision and in Owen's certified territory. Owen also filed on October 2, 1989, a motion for the entry of an Order for that relief pending conclusion of the case. The Commission heard oral arguments on Owen's motion on October 12, 1989.

The Commission understands that the issues and arguments presented at the October 12 hearing are part of the larger case pending in Boone Circuit Court.¹ The constitutionality of the Certified Territory Act (KRS 278.016-.018) has been challenged, it being superseded, alleges ULH&P, by Sections 163 and 164 of the Kentucky Constitution, which deal with municipal franchises and rights of cities thereunder. The parties in this case agree, and the Commission acknowledges, that the Commission cannot pass on the constitutionality of statutes. Statutes, however, are presumed constitutional until judicially determined to be otherwise. Foster Trading Co. v. Lockett, Ky., 303 S.W.2d 315 (1957).

There is no disagreement as to the material facts of this case. ULH&P admits that it intends to offer service in Owen's certified territory and contrary to the requirement of KRS 278.018. ULH&P argues that, until the Boone Circuit Court renders a decision, the Commission cannot enforce that statute. Owen argues that the law obligates the Commission to enforce all provisions of KRS Chapter 278 until any such provision is held unconstitutional. The Commission agrees with Owen and grants the motion.

ULH&P asserts the Commission has lost jurisdiction over ULH&P's intended action to the Boone Circuit Court. The

¹ Boone Circuit Court, Civil Action No. 89-CI-388, styled City of Florence, et al. v. Owen County Rural Electric Cooperative Corporation, et al. The Commission is a party defendant to that action.

defendant-utility, though, does not cite any law to that effect. In the absence of such citation to the circuit court's preemptive rights, in view of the well-established presumption of constitutionality exemplified by Foster Trading Co., and by the unequivocal mandate of KRS 78.040(1), the Commission must reject that argument by ULH&P.

To stay enforcement of KRS 278.018 would require the Commission to presume that provision is not constitutional, else the Commission would have no right not to give the statute its full effect. For KRS 278.040(1) can be no plainer:

The public service commission shall regulate utilities and enforce the provisions of this chapter.

Following Foster Trading Co., supra, such a presumption of unconstitutionality is unwarranted. Perforce, the Commission must presume KRS 278.018 to be lawful until established to the contrary and, lacking the power to make judgment as to the constitutionality of the statute, in consequence cannot refuse to uphold that law.

IT IS THEREFORE ORDERED that:

1. ULH&P shall not furnish, make available, render, or extend its retail electric service to any customer for use in any electric-consuming facilities in any part of the Subdivision which lies within the certified territory of Owen, pending a final Order in this case.

2. The final decision on the merits in this case shall be and hereby is held in abeyance pending the final decision of the Boone Circuit Court.

Done at Frankfort, Kentucky, this 6th day of November, 1989.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner

ATTEST:

Executive Director